SUPREME COURT, U. S.
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FILED
MAR 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1008

JAMES M. BACON, *et al.*,

Petitioners,

v.

TEXACO INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR RESPONDENT TEXACO INC. IN OPPOSITION

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It is respectfully submitted that the Court's recent decision in *Gulf Oil Corp.* v. *Copp Paving Co.*, 43 U.S.L.W. 4059 (December 17, 1974), deals dispositively with the issues presented by the Petition and leaves no reason for grant of the Writ.

This is an action for alleged violations of the price discrimination provisions of Section 2(a) of the Clayton Act, as amended by the Robinson Patman Act, 15 U.S.C.A. §13

(a). The petitioners are gasoline retailers in Corpus Christi, Texas, who complain that Texaco sold gasoline to the Texas Star Distributing Company in that city for four cents below the price it charged them. It is undisputed that the gasoline sold to both the petitioners and the allegedly favored purchaser was refined in Texas and sold to them there (Pet. 4-5). As none of the gasoline purchases involved in the alleged discrimination was "in commerce," the District Court granted summary judgment (Pet. Ex. A), 371 F.Supp. 78 (S.D. Tex. 1974), and the Court of Appeals affirmed *per curiam* (Pet. Ex. B), 1974-2 Trade Cas. ¶75,358 (5th Cir. 1974).

This Court's *Copp* decision fully confirms the validity of the decisions below. It explains:

> "With almost perfect consistency, the circuit courts have read the language requiring that 'either or any of the purchases involved in such discrimination [be] in commerce' to mean that §2(a) applies only where 'at least one of the two transactions which, when compared, generate a discrimination * * * cross a state line' [citing *"Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4, 9 (CA 5), cert. denied, 396 U.S. 901 (1969); *Belliston* v. *Texaco Inc.*, 455 F.2d 175, 178 (CA 10), cert. denied, 408 U.S. 928 (1972)"]. In the face of this long standing interpretation and the continued congressional silence, the legislative history does not warrant our extending §2(a) beyond its clear language to reach a multitude of local activities that hitherto have been left to state and local regulation." 43 U.S.L.W. at 4063-64.

Accordingly, the decision holds that "[u]nless it appears * * * that at least one of [the seller's] allegedly discrimina-

tory sales was made in interstate commerce (§2(a)), [plaintiff's] claims must fail." *Id.* at 4062.

Since this requirement is not met in this case, the Petition omits any reference to these controlling principles of the *Copp* decision and, indeed, seems to deny their existence.[1] It proceeds to focus on immaterial factual differences (Pet. 9-10) and to urge that because some of the raw crude oil which was refined in Texas into gasoline and other petroleum products emanated from out-of-state, this should suffice (*id.* at 12-3).[2]

However, *Copp* made emphatically clear that if the statutory requisites are now to be deleted or altered, it is Congress, and not this Court, which will have to change the law. Under the statute as it presently stands, there is no violation where the purchases by the favored and disfavored customers are both—as here—entirely intrastate.

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1. For example, referring to *Copp*, the Petition states at one point:

> "that decision leaves open, if it does not in fact invite, the possibility of some expansion of the 'facially narrow language' on the basis of Congressional intent" (Pet. 12).

Elsewhere, it goes further and asserts that

> "the opinion seemingly rejects the * * * test * * * applied by the Court below—if the particular product involved did not itself cross the state line, it is not 'in commerce'" (*id.* at 8).

2. This notion, as the Courts below observed, has been uniformly rejected. Pet. Ex. A, p. 20 (371 F. Supp. at 80); Pet. Ex. B, pp. 27-8 (1974-2 Trade Cas. at 98,144). Since the origin of the raw materials from which a product involved in discriminatory sales is produced has no relevance to the statutory test, the *Copp* opinion does not refer to the sources of the crude oil from which the asphalt in that case was produced.

It is respectfully submitted, therefore, that the Petition should be denied.

Respectfully submitted,

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